In the Court of Appeal for/of Nunavut

Citation: R v Kolola, 2013 NUCA 08

Date: 20131010
Docket: 08-10-003 CAP
Registry: Iqaluit

Between:

Her Majesty the Queen

Respondent

- and -

Pingoatuk Kolola

Appellant

The Court:

The Honourable Madam Justice Constance Hunt
The Honourable Mr. Justice Clifton O'Brien
The Honourable Mr. Justice Frans Slatter

Memorandum of Judgment

Appeal from the Conviction by
The Honourable Mr. Justice Kilpatrick
Dated the 1st day of March, 2010
(Docket: 09-07-56)

Memorandum of Judgment

The Court:

[1] The appellant, Pingoatuk Kolola, was convicted of first degree murder for killing a police officer and was sentenced to life imprisonment without the possibility of parole for 25 years. He appeals his conviction and seeks a new trial.

[2] The basic facts are not in dispute. The appellant lived in the hamlet of Kimmirut with his common law wife, Ooleetua Judea, and their infant son. On November 7, 2007 the appellant discovered his common law wife was seeking to have him evicted from their home. The appellant became angry and began to drink. Sometime later, he ordered Ooleetua out of the home and told her to leave the baby behind. He threatened her, and warned her not to call the police.

[3] Soon after Ooleetua left, the appellant grabbed his Remington .30-06 rifle, and his son, and drove off with both in a truck. A series of violent confrontations followed with both his common law wife and his niece. A neighbour viewing these events called the police.

[4] Constable Scott responded to the call. Various members of the community had observed the appellant driving around in the truck and they directed Constable Scott to the local arena. As the police officer approached the arena, the appellant drove his truck onto a stack of lumber at an adjacent construction site and got stuck. He exited the vehicle, weapon in hand. When the approaching police vehicle stopped, the appellant shot at it and Constable Scott was hit in the forehead. He died instantly.

[5] The appellant returned to his house where he tried to hide the empty shell casing. He called his employer who came and retrieved the child. By 3:00 AM a SWAT team from Iqaluit was in position around the appellant's house and he was arrested without further incident.

[6] The appellant was charged with first degree murder pursuant to section 235(1) of the *Criminal Code*. He elected trial by jury. The appellant admitted four of the five requirements under section 231(4) of the *Code* which sets out the requirements of first degree murder when the victim is a police officer. He admitted he had fired the fatal shot, all the while knowing that Constable Scott was a police officer carrying out his lawful duties. He submitted, however, that he had been suicidal and had not intended to kill the policeman. He sought conviction for manslaughter only. After being instructed in the law, the jury deliberated for four days before finding the appellant guilty of first degree murder.

[7] The appellant raises three grounds of appeal with respect to the jury charge. He submits the trial judge erred in law in his instructions to the jury by suggesting that an absence of intent was a defence, thus implying there was a burden on the appellant to prove an element of the offence. He also submits the trial judge erred in his *WD* instruction by misstating the second element, and by

stating the appellant could be found to intend the natural consequences of his actions, thereby compromising the *WD* instruction: *R v W(D)*, [1991] 1 SCR 742.

[8] Dealing with the first ground of appeal, we acknowledge that the trial judge did suggest to the jury, on one occasion, that a lack of intent might constitute a defence. We agree with the Crown, however, that the jury could not have been under any misapprehension about the Crown's duty to prove intent beyond a reasonable doubt when the jury charge is read as a whole. The charge is replete with references to the Crown's duty to prove all the elements of the offence beyond a reasonable doubt, and when the trial judge reached the point in his charge where he was dealing specifically with the issue of intent he stated the correct test three times. He told the jury:

> The Crown must prove beyond a reasonable doubt either that Mr. Kolola meant to kill Douglas Scott when he fired his rifle at the police vehicle or that Mr. Kolola meant to cause Douglas Scott bodily harm that he knew was so serious and so dangerous that it was likely to kill him and he proceeded to pull the trigger on his rifle despite his knowledge of this risk.
>
> Now please understand that the Crown does not have to prove the Mr. Kolola had both these intentions. Proof of either state of mind is sufficient for murder. All of you do not have to agree that Mr. Kolola had the same intent as long as each one of you is satisfied that one of the other intent has been proven beyond a reasonable doubt.
>
> I repeat once again, ladies and gentlemen, the Crown must prove either Mr. Kolola meant to kill Douglas Scott when he fired his rifle or that Mr. Kolola meant to cause Douglas Scott bodily harm that he knew was so serious and so dangerous that it was likely to kill, and he proceeded to pull the trigger despite his knowledge of the risk. [AB 586-587]

[9] The trial judge reiterated this theme on two more occasions when dealing with the issue of intoxication [AB 592, 594-95]. In our view, therefore, there is no likelihood that the jury would have been confused about the Crown's duty to prove intention beyond a reasonable doubt.

[10] The appellant's second ground of appeal is that the trial judge erred in his *WD* instruction by not articulating the second element properly. The second element of the charge suggested in *WD* is this: if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit. The Supreme Court has made clear in subsequent cases that the formula set out in the *WD* case is not a precise mantra, *R v CLY*, 2008 SCC 2, [2008] 1 SCR 5 at paras 7-9. We have reviewed the trial judge's *WD* instruction and find that it complies in substance with the formula set out in *WD*. We conclude, therefore, that there is no merit to this ground of appeal.

[11] The appellant's final ground of appeal is that the trial judge compromised the *WD* instruction by stating that a person can be found to intend the natural consequences of his acts. This argument, although listed as a ground of appeal in the appellant's factum, was not argued further. In any event, we see no basis for concluding that there was any error in this regard given our reading of the trial judge's charge, including his *WD* instruction. Consequently, this ground of appeal must also be dismissed.

[12] In summary, the appeal is dismissed.

Appeal heard on September 24, 2013

Memorandum filed at Iqaluit, Nunavut
this day of October, 2013

Hunt J.A.

O'Brien J.A.

Authorized to sign for: Slatter J.A.

Appearances:

N.E. Devlin
for the Respondent

T.H. Boyd
for the Appellant